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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ERIC FRIMPONG, Defendant and Appellant.	2d Crim. No. B206433 (Super. Ct. No. 1218308) (Santa Barbara County)

Eric Frimpong appeals from the judgment following his conviction by jury of forcible rape. (Pen. Code, § 261, subd. (a)(2).)[1] The jury acquitted him of a sexual battery involving a separate victim. The court sentenced him to six years in prison. Appellant contends that the prosecutor engaged in misconduct, withheld exculpatory evidence, and improperly commented on his silence at trial in violation of *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*); and that the court committed prejudicial evidentiary and instructional errors, failed to discharge a biased juror, and erroneously denied his motion for a new trial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Patricia D. (Tricia), the victim, and appellant attended the University of California at Santa Barbara (UCSB) in February 2007. Tricia, a freshman, lived

[1] All statutory references are to the Penal Code unless stated otherwise.

on campus. Appellant, a senior, lived near campus. Tricia had dated Benjamin R., another student, since October 2006. They were sexually active, last having had protected sexual intercourse on February 13.

On February 16, 2007, a Friday, Tricia had just recovered her driving privileges, which had been suspended for driving under the influence. Tricia had also just passed a test for a job at a delicatessen. She was ready to celebrate with her friends and her older sister, Betsy, who was coming to visit.

While waiting for Betsy to arrive, Tricia and her friends L.K. and M.W. were drinking in the residence hall, at about 6:00 p.m. Tricia had drunk at least three shots of vodka. Betsy arrived and accompanied Tricia, L.K., and M.W. to a party in Isla Vista, at the home of their friend, Collin. While there, Tricia drank two beers and saw Benjamin R.

Tricia, M.W., Benjamin R., and several of her "guy friends" walked to another party at the home of their friend, Steve. Betsy and L.K. left. Tricia drank four shots of rum and possibly more beer at Steve's house. M.W. went home around 10:45 p.m., and Benjamin R. left to meet a female friend. When Tricia left the party, around 11:09 p.m., she walked, alone, to a house where several "ATO" fraternity members lived, at 6681 Del Playa Drive (the ATO house). She was hoping to meet some friends who would help her get into a party there. Tricia was drunk at that point and she spoke with her sister on her cell phone while walking.

Tricia waited outside the ATO house and repeatedly called her friends who lived there. They did not answer her phone calls. While waiting, she started talking with appellant, another UCSB student who she met on the street. Appellant lived down the street on Del Playa, was 21 years old, and said that he had beer at his house. He invited Tricia there to play beer pong, a drinking game; she agreed to go. Benjamin R. saw them walking arm-in-arm on Del Playa. He got upset, called Tricia immediately, at 11:44 p.m., and asked who she was with, and what she was doing. She said that she was going to play beer pong at her new friend Eric's house.

Several of appellant's friends and roommates were at his home while he and Tricia were there. After meeting several of appellant's friends, Tricia went outside with appellant. They placed cups of beer on opposite sides of the beer pong table and played for about 20 minutes. Tricia was losing which meant that she had to drink a lot of beer.

Appellant and Tricia left his backyard, together, between 12:00 and 12:30 a.m. They decided to go to the beach. Tricia was wearing a pair of jeans, a red tank top, black shoes, and a black jacket. Appellant threw Tricia down on her back. When she screamed, appellant grabbed her throat and hit her. He started to strangle her and she could not scream. She thought she tried to hit or scratch him, but she could not get away. He pinned her arms back and she could not move them. He held her "down and . . . basically [held her] mouth shut." He was very close to her face and her cheek hurt as if someone was sinking their teeth into her skin.

Tricia tried to turn to her side, but appellant removed her jeans and underwear and forced her legs open. He put his hands on her arms and raped her. She was not sure how much time passed before he got up and ran away. She "just kind of laid there." She awoke, alone, with just her shirt and jacket on. She noticed a bite mark on her left buttock but did not know how it got there. Her underwear and pants were about 10 feet away. She grabbed them and put them on. She could not find her purse or shoes.

After several minutes, Tricia managed to run back up toward Del Playa to try to call her friends. She asked to borrow the phone of the first person she saw, a young man named Justin H.. She used Justin's phone to call a friend at 1:15 a.m., and her father at 1:24 a.m. Her sister Betsy called Justin's cell phone at 1:34 a.m.

Tricia eventually reached L.K., who in turn contacted M.W. L.K. rode in a car with M.W. to the Isla Vista area. They called Justin's cell number, and learned that Tricia was near 6613 or 6619 Del Playa Road. When they located her, she was crying, and her clothes were covered with sand. She was not wearing shoes

or carrying her purse. L.K. noticed a weird bruise on Tricia's face that looked like a bite mark. Tricia cried continuously and said that she had been raped on the beach.

M.W. and L.K. took Tricia to the residence hall. She initially refused to go to the hospital. She later agreed to go there with her friends and her sister. The emergency room doctor treated a contusion on Tricia's face and her sprained left wrist.

Santa Barbara County Sheriff Deputy Joel Rivlin interviewed Tricia at the hospital. When he asked about the injuries on her face, she told him that her attacker hit her on the face with a fist or partially open hand. She did not say that he bit her. Tricia did not think that she lost consciousness at any point but said she "maybe could've," and did not "know [and that] the whole like string of events [was] kind of like a blur."

Rivlin took Tricia to the Sexual Assault Response Team (SART) Cottage where Judy Malmgren, a forensic nurse, interviewed and examined her. Tricia's right cheek was red and puffy, her chin was red, and there were abrasions and an impression mark on her left inner thigh. Her neck had injuries consistent with strangulation--pain, difficulty swallowing, and petechia (tiny, pinpoint hemorrhagic dots caused by injured capillaries below the skin).

Malmgren noticed something that looked like sand between Tricia's labia and the area between her vagina and rectum. A half-inch tear or laceration on her genitals was bleeding. Three other areas of her genitals were red and tender, with abrasions. Malmgren opined that the abrasions were blunt force injuries that could have been caused by a penis or a finger. Because it was too painful for Tricia, Malmgren could not use a speculum to examine her interior vagina.

Malmgren took swabs of Tricia's neck, throat, right cheek, left thigh, her external genitals, and four swabs of her internal genital area. She detected no sperm on the genital swabs. There would be no sperm if the assailant had used a condom, did not ejaculate, or withdrew before ejaculating. There was some kind of secretion and "sand-like material" on Tricia's underwear.

Tricia returned to the residence hall later that morning. Santa Barbara County Sheriff Detectives Daniel Kies and Michael Scherbarth interviewed her there. They noticed a circular red mark on her right cheek that looked like a bite mark.

Still later on February 17, Tricia started her new job. M.W. and L.K. accompanied her to the delicatessen that day, remained during her shift, and continued to do so for some time.

On February 17, Scherberth and Kies went to several houses looking for a suspect who matched Tricia's description of the assailant (a "Black" man named Eric who spoke with an "island accent, like the Caribbean"). They located appellant among a group of people near a residence. The residence had a beer pong table like the one that Tricia had described. Appellant matched Tricia's description. He agreed to accompany the detectives to the station.

At first, appellant denied that he met any woman on the prior night, other than his friend, Krystal Giang. He said that he had watched television with his roommates after dinner on the prior night, and left his house alone at around 9:00 p.m. While walking down the street, he met some friends who invited him to a party. He sipped a drink at that party that put him in a "weird daze." A woman at the party wanted to play beer pong, so they went to his house to play. Appellant recalled that at about midnight, he went to Giang's house and stayed there for a long time. He and Giang then stopped briefly at a party in her building. Appellant walked to the apartment of his girlfriend, Ysenio Prieto, where he stayed for several hours. Prieto recalled that he arrived sometime after 3:00 a.m.

When asked, appellant told the detectives that he did not recall having sex with a woman on the beach. Scherbarth took an oral swab from appellant. Appellant also willingly submitted to a SART examination that involved taking swabs of his penis, scrotum, and fingers.

Criminalist Lillian Tugado analyzed a cutting from Tricia's underwear and several swabs from her thigh, abdomen, face, neck, throat, and from her blood.

Tugado had deoxyribonucleic acid (DNA) profiles of appellant, Tricia, and Benjamin R.

DNA detected in the sample from appellant's penile swab matched Tricia's DNA profile. The probability that a random, unrelated individual would by chance be the major contributor to the penile swab is approximately one in 7.2 trillion for African Americans, one in 370 billion for Caucasians and one in 180 billion for Hispanics. The DNA from swabs of Tricia's face matched her profile and did not contain DNA foreign to her.

Tugado analyzed a swab from appellant's scrotum that included DNA from a female contributor. Tricia could not be ruled out as the contributor of that DNA. Tugado also analyzed female DNA recovered from appellant's fingernails and found "strong evidence that [Tricia was a] contributor of that DNA." Assuming that a swab is taken from one person approximately 13 hours after his contact with another person, it is less likely for that swab to have detectable DNA if the contact involves no exchange of bodily fluids. When a person touches the skin of another person, there is not a lot of cell transfer between them.

A Santa Barbara dentist made a mold of appellant's teeth and Benjamin R.'s teeth. Norman Sperber, the chief forensic dentist for San Diego County, analyzed photographs of the bite marks on Tricia's body, the mold of appellant's teeth and the mold of Benjamin R.'s teeth. He concluded that appellant could not be excluded as the person who left the bite marks on her face. He concluded that Benjamin R. could be excluded as the person who left those bite marks.

The jeans that appellant was wearing on the night of February16 contained sand. The belt he then wore had sand granules.

Tricia viewed a photographic lineup and identified appellant as her assailant. She also identified an audio recording of his voice as that of her assailant.

On February 28, 2007, L.K. and M.W. were with Tricia during her work shift when appellant entered the delicatessen. Tricia had a "panic attack," ran

to the back of the delicatessen, and started crying. She stayed there until L.K. confirmed that appellant was gone.

Criminalist Dean Warden analyzed the blood sample that Tricia provided at about 5:47 a.m., on February 17. It showed that her blood alcohol level was .20. Based on her 5:47 a.m. blood alcohol level, and the reported amount of alcohol that she had consumed, Warden opined that by 1:00 a.m., her blood alcohol level would have been at least .26.

DISCUSSION

Failure to Discharge Arrested Juror

Appellant contends that the court deprived him of his constitutional right to an impartial jury by failing to discharge a juror who was arrested after the jury began its deliberations. We disagree.

A defendant charged with a crime has the constitutional right to the unanimous verdict of 12 impartial jurors. (*People v. Harris* (2008) 43 Cal.4th 1269, 1303.) Section 1089, which governs the discharge of seated jurors in criminal matters, provides that "[i]f at any time . . . a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged . . . ."

"'"[O]nce a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty 'to make whatever inquiry is reasonably necessary' to determine whether the juror should be discharged."' [Citations.]" (*People v. Martinez* (2010) 47 Cal.4th 911 __ [2010 WL 114933 at p. 20].) Before we can find that a trial court erred "in failing to excuse a seated juror, the juror's inability to perform a juror's functions must be shown by the record to be a 'demonstrable reality.' [We] will not presume bias, and will uphold the trial court's exercise of discretion on whether a seated juror should be discharged for good cause under section 1089 if supported by substantial evidence."' [Citations.]" (*Id.* at p. 21.)

In this case, the jury started deliberating on Friday, December 14, 2007. On Monday, December 17, 2007, the court advised counsel that Juror No. 5 was arrested during the weekend for driving under the influence. Based on comments in the arrest report, the prosecutor expressed concern about Juror No. 5's attitude and her ability to be fair with law enforcement. At that point, defense counsel refused to stipulate to the removal of Juror No. 5.

Later the same day, the court questioned Juror No. 5 outside the presence of other jurors. Juror No. 5 expressed certainty that she could be "fair and impartial." Appellant's trial counsel later noted that after her arrest, the boyfriend of Juror No. 5 had contacted an acquaintance who was an assistant district attorney. His acquaintance was not involved with appellant's case. Counsel expressed his concern about Juror No. 5's "ex parte" communication and her ability to evaluate appellant's case while she had a case pending with the same office that was prosecuting him. After noting that Juror No. 5 had indicated her ability to be fair and impartial, the court concluded that there was not good cause to excuse her.

Citing *Brooks v. Dretke* (5th Cir. 2005) 418 F.3d 430, 431, appellant argues that "as a matter of law, a juror facing charges filed by the prosecutorial office presenting the case must be dismissed." We disagree. *Brooks* did not state as a matter of law "that any outstanding misdemeanor charge should support a finding of implied bias." (*Id*. at p. 435.) Rather, "[i]t is . . . the sum of all factual circumstances surrounding th[e] juror [involved], in particular, the power of the District Attorney, and the timing and sequence of events [that] compel[led] the court's conclusion. (*Ibid*. fn. omitted.) We also reject appellant's claim that "*Brooks* is on point." While entering the courthouse to serve in a capital case, a juror was arrested for carrying a concealed weapon and then subjected to "'one entire week of hell'" and "'unrelenting embarrassment'" because his name and the *Brooks* case constituted "the head story at twelve, five, six and ten o'clock for four straight days.'" (*Id*. at pp. 434-435.) This case lacks the extreme circumstances that compelled a finding of implied bias in *Brooks*.

Appellant also cites the concurring opinion of Justice O'Connor in *Smith v. Phillips* (1982) 455 U.S. 209, 221-224, in arguing that his case involves implied bias. In *Smith*, the high court affirmed a verdict returned by a jury that included a juror who applied "for employment as a major felony investigator in the District Attorney's Office" (*id.* at p. 212) during trial despite "the obvious inherent motivation the job applicant may have had to reach a verdict favorable to the prospective employer." (See *In re Carpenter* (1995) 9 Cal.4th 634, 647.) The court "rejected the argument that 'the law must impute bias to jurors' in that position" and stated it had "long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove *actual* bias. [Citation.]" (*Ibid.*)

In her concurring opinion, Justice O'Connor recognized that "there are some extreme situations that would justify a finding of implied bias." (*Smith v. Phillips*, *supra*, 455 U.S. at p. 222.) She listed some examples: "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." (*Ibid.*) Appellant's case does not involve such an extreme situation.

Here, after learning that Juror No. 5 had been arrested, the court conducted a hearing, and provided appellant the opportunity to prove actual bias. (*Smith v. Phillips*, *supra*, 455 U.S. at pp. 212, 215.) Juror No. 5 expressed certainty that she could be fair and impartial. The court found her credible and concluded that there was not cause to excuse her. We defer to the court's evaluation of her credibility. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 646.)

At appellant's request, we take judicial notice of the brief filed by the Attorney General in *People v. Holt* (1997) 15 Cal.4th 619. (Evid. Code, § 459, rule 8.252, Cal. Rules of Court.) Appellant stresses that the Attorney General in *Holt* argued that "litigation adversity constituted statutory implied bias." *Holt* concerned a challenge to a prospective juror with a pending lawsuit against the prosecutor and the statutory definition of implied bias in the context of such challenges. (*People v.*

Holt, *supra*, at pp. 654-655, citing Code of Civ. Proc. §§ 225, subd. (b)(1)(B), 229.) Neither *Holt*, nor the Attorney General's argument therein, supports a finding of implied bias in this case.

Appellant further argues that the contact between the boyfriend of Juror No. 5 and an assistant district attorney shows that Juror No. 5 was biased and unable to perform her duties in a fair and impartial manner. We disagree. Juror No. 5 did not contact the prosecutor's office; her boyfriend did. The assistant district attorney with whom he spoke was not involved in appellant's case. Juror No. 5 did not even learn what statements the assistant district attorney made to her boyfriend.

The record does not show as a demonstrable reality that Juror No. 5 was unable to perform a juror's functions as a result of implied bias. Substantial evidence supports the trial court's exercise of discretion in deciding that Juror No. 5 should not be discharged for good cause under section 1089. (*People v. Martinez*, *supra*, 47 Cal.4th 911 [2010 WL 114933 at p. 21].) Therefore, we have no basis to conclude that appellant was denied his Sixth Amendment right to an impartial jury. (*People v. Holloway* (2004) 33 Cal.4th 124, 126.)

Benjamin R. Bite Mark Evidence

Appellant argues that the court improperly admitted Dr. Norman Sperber's opinion that Benjamin R. could be excluded as the biter because the prosecution disclosed that evidence so late that he was denied a fair opportunity to rebut it. We disagree.

Before trial, the prosecution disclosed that Sperber would testify that he could not exclude appellant as the person who bit Tricia. Counsel made opening statements on November 26, 2007. On December 6, the trial prosecutor provided appellant's counsel a note summarizing Sperber's conclusion that Benjamin R. did not cause the bite marks on Tricia. On December 7, the prosecutor provided appellant's counsel with a report stating that on December 6, Dr. Kopelow made a cast of Benjamin R.'s teeth. The prosecution planned to present Sperber's testimony on December 7. Appellant's counsel objected that he could not prepare to cross

examine him regarding the Benjamin R. evidence. He asked the court to exclude Sperber's testimony regarding Benjamin R. The prosecutor claimed that it was only after trial began that she realized that the defense would argue that Benjamin R. was Tricia's assailant.

On December 7, 2007, Sperber testified outside the jury's presence. He met with Benjamin R. in the prosecutor's office, along with Detective Kies, in the morning on December 6, and viewed Benjamin R.'s mouth. The court determined that appellant's counsel was unaware of Sperber's evaluation of Benjamin R. until the afternoon of December 6.

The prosecution had known since March 2007, that Benjamin R.'s DNA was detected in semen from underwear worn by Tricia on the night of the rape; it also knew before trial that Benjamin R. saw Tricia with appellant that night, before midnight, and that Benjamin R. had failed to tell law enforcement that he was upset with Tricia after seeing her with appellant that night. The court nevertheless found it reasonable that the prosecution did not anticipate that the defense would suggest that Benjamin R. could be Tricia's assailant. Rather than excluding Sperber's testimony regarding Benjamin R., the court ordered that he could not testify until December 11, 2007. It also authorized the release of the dental molds of Benjamin R. and appellant and other bite mark evidence so that a defense expert could evaluate them.

Section 1054.1, subdivisions (e) and (f) requires prosecutors to disclose any relevant written or recorded statements of witnesses, or reports of the statements of witnesses whom they intend to call at trial. If the prosecutor did violate its duty to disclose Sperber's testimony regarding Benjamin R., the court was required to impose an appropriate sanction. Unless it found significant prejudice to the defendant, as well as willful conduct motivated by the prosecutor's desire to obtain a tactical advantage at trial, however, the court could not prohibit the challenged testimony without exhausting all other sanctions. Those other sanctions include "delaying . . . the testimony of a witness . . . ." (§ 1054.5, subds.

(b) & (c).) Because the court did not find that the prosecutor engaged in such willful delay, it acted properly in delaying Sperber's testimony.

Sperber completed his testimony on December 11, 2007. The dental molds were released to the defense after his testimony so that the defense expert could use them. On December 12, 2007, counsel advised the court that defense expert Dr. Charles Bowers was "going in for surgery" but counsel was still hoping to have him testify. Appellant did not call Bowers as a witness or request another continuance so that he could testify. Therefore, he cannot seek reversal based on the admission of Sperber's testimony concerning Benjamin R. (See *People v. Morrison* (2004) 34 Cal.4th 698, 714.)

Brady Claim

Appellant contends that the prosecution breached its duty under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) to disclose all material, exculpatory evidence because it failed to disclose information that Ray Johansen, an odontologist, provided to Detective Kies before trial. We disagree.

During cross-examination on December 11, Kies admitted that he spoke to a local dentist, Ray Johansen, and provided him images of Tricia's bite marks and a suspect's (appellant's) teeth. Kies testified that he had not advised anyone in the prosecutor's office about that consultation. Appellant's counsel learned about Johansen's review of bite mark evidence indirectly just before trial. He sought a mistrial based on prosecutorial misconduct in violation of *Brady*. In the alternative, he asked the court to exclude the testimony of prosecution dental expert Sperber, because the defense had no opportunity to evaluate the Johansen opinion before Sperber had testified at the earlier Evidence Code section 402 hearing.

The court conducted an inquiry outside the jury's presence. Kies testified that he obtained information from Johansen regarding the amount that he would charge for a bite mark analysis. His charges would range from $2,400-$2,800. After Senior Deputy District Attorney Ron Zonen advised Kies that

Sperber was much more credentialed, Kies did not hire Johansen. Kies did not recall that Johansen gave him any report. The trial court stated that it was tentatively inclined to exclude Sperber's testimony because the prosecution should have disclosed its consultation with Johansen.

Sergeant Greg Weitzman of the Santa Barbara Sheriff's Department testified about the events preceding their selection of Sperber. He testified that Sperber's rate was "zero."

Zonan testified that Weitzman and Kies had wanted to use a local dentist as a bite mark expert for convenience and cost. He told them they could do so but later learned that they were using Sperber. Zonan thought their selection of Sperber had "everything to do with money" rather than substance. He did not have the impression that the local dentist had done any analysis.

Johansen testified that approximately four months before trial, someone from law enforcement (Kies) provided him with images of Tricia's bite marks and a suspect's (appellant's) teeth. After a preliminary two-hour review, Johansen concluded that the bite mark images were "fairly vague" and appellant's teeth were fairly normal. He told Kies that even with further analysis, he would probably not be able to say much more except that he could not exclude the suspect (appellant) as the biter.

The court found that Johansen's preliminary opinion was not inconsistent with Sperber's anticipated testimony that appellant could not be excluded as the possible source of the bite mark on Tricia's face. It therefore concluded that Johansen's opinion was not material and exculpatory evidence within the meaning of *Brady*. It imposed no sanction and permitted Sperber to testify.

During cross examination, Sperber testified that he did not charge for his initial 15-minute consultation, but he was being paid $300 per hour for working on the case and $400 per hour while testifying. The trial prosecutor (not Zonan) stated that she did not learn of the Johansen consultation until Kies was testifying. Citing the prosecution's purported claim that cost was a key factor for its selection

of Sperber rather than Johansen, appellant again argued that the prosecution withheld evidence because it hurt its case. The court imposed no sanction. It admonished Kies to write a report whenever he contacted an expert and include the reasons the expert was not used.

While discussing jury instructions, appellant again argued that the court should have sanctioned the prosecution under section 1054 and the United States Constitution for its *Brady* violation. The court indicated that it was tailoring a pinpoint instruction based on the standard instruction (CALCRIM No. 306) that trial courts are told to use. It gave the jury the following curative instruction: "The Santa Barbara Sheriff's detectives failed to disclose that Dr. Raymond Johansen, a forensic odontologist, was first contacted by Sheriff's detectives to review the photos of [Tricia's] injuries and photos of the defendant's teeth. He concluded after a preliminary 2-hour examination that the best he could say was the defendant could not be excluded as a source of the bite marks and that the photos of the injuries were "vague[.]" He told detectives that more time would be necessary to conduct a more thorough and complete comparison. [¶] Subsequently, Sheriff's detectives contacted Dr. Norman Sperber who conducted a comparison of the defendant's teeth with photos of [Tricia's] injuries using more materials than were previously available to Dr. Johansen, including the molds or castings of the defendant's teeth. [¶] In evaluating the weight and significance of Dr. Sperber's testimony, you may consider the effect, if any, of the late disclosure of Dr. Johansen and his preliminary opinion."

Brady imposes on the prosecution an affirmative duty to disclose material, exculpatory information to the defense, "irrespective of the good faith or bad faith of the prosecution." (*Brady, supra*, 373 U.S. at p. 87.) Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*United States v. Bagley* (1985) 473 U.S. 667, 682.) A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. (*Id.* at p. 674.) Here, appellant

argues that Johansen's opinion was material and exculpatory because of its distinct basis -- the vagueness of the bite marks. It thus contrasted with Sperber's detailed testimony about the "ways he felt appellant's upper and lower teeth were consistent with" Tricia's bite mark injuries. However, both experts concluded that they could not exclude appellant as the biter. The record supports the trial court's conclusion that Johansen's opinion did not constitute material, exculpatory evidence under *Brady*. (*Id.* at p. 682.)

Panic Attack Evidence

Appellant claims that the court violated due process by admitting evidence that Tricia had a panic attack on February 28, 2007, when he entered the delicatessen while she was working. The record belies this claim.

In objecting to the panic attack evidence below, appellant asserted that its prejudicial impact would outweigh its probative value. (See Evid. Code, § 352.) It did not challenge the evidence on constitutional grounds. We review the trial court's ruling pursuant to Evidence Code section 352 for an abuse of discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) The court admitted the evidence because Tricia's reaction to appellant was relevant to determine whether appellant was the assailant. Further, appellant's counsel elicited testimony that when appellant entered the delicatessen, he just placed a food order, and did nothing unusual. That evidence dispelled any inference that appellant intended to intimidate Tricia by entering the delicatessen.

Expert Evidence Claim

Appellant further argues that the trial court erred by allowing two prosecution experts to testify regarding the reasons that sperm might not have been detected on Tricia's vaginal swabs, which "allow[ed] the prosecutor to bolster the prosecution's case with 'expert' opinion that amounted to mere speculation . . . ." He claims that these errors violated his federal constitutional rights to due process and rendered his trial fundamentally unfair. We disagree.

The prosecutor asked Malmgren, the SART forensic nurse examiner, for some reasons that sperm might not be found on the vagina of an alleged sexual assault victim. The court initially sustained appellant's objections on multiple grounds but ultimately permitted Malmgren to opine that she may have seen no sperm because she could not use a speculum to collect the swabs samples from Tricia.

After a criminalist testified that she did not find any sperm or semen on the vaginal slides from Tricia's swabs, the prosecutor asked why "there may not be sperm present after an act of sexual assault that involves intercourse." The trial court overruled defense objections that the question called for speculation and lacked a foundation for an expert opinion. The criminalist testified that she "could think" of several reasons, "off the top" of her head: the perpetrator wore a condom, there was penetration without ejaculation, or the perpetrator withdrew before ejaculating, or the victim might have douched or washed her vaginal area.

We review a court's decision to admit expert testimony for an abuse of discretion. (*People v. Lindberg* (2008) 45 Cal.4th 1, 45.) Evidence Code section 801 authorizes the admission of expert testimony if it is related to a subject "that is sufficiently beyond common experience" so that the expert's opinion "would assist the trier of fact." (*Id.* subd. (a); *People v. Prince* (2007) 40 Cal.4th 1179, 1222.) An expert may also testify """. . . "'. . . even when jurors are not 'wholly ignorant' about the subject of the testimony . . ." where the "expert testimony would assist the jury." (*People v. Prince, supra,* at p. 1222; see *People v. Farnam* (2002) 28 Cal.4th 107, 162-163) The court acted within its discretion in admitting the challenged opinions.

Prosecutorial Misconduct

We reject appellant's contention that the prosecutor engaged in prejudicial misconduct by questioning a criminalist about the availability of swabs taken from appellant's penis and scrotum for further testing and by making unsupported argument to the jury concerning certain testimony. The prosecutor

asked the criminalist if she had consumed all of the swabs taken from appellant's penis, and whether any swabs were retained for further testing. Appellant sought a mistrial and argued that those questions improperly suggested that jurors consider appellant's failure to test the swabs, despite appellant's right to rest on the state of the evidence. The questions were not improper. They "merely asked whether there was evidence for retesting." (*People v. Bennett* (2009) 45 Cal.4th 577, 596.)

Appellant accurately claims that the prosecutor made an unsupported argument that Malmgren had testified that "most of the times in sexual assault cases there's not ejaculation." Malmgren did not provide such testimony. "[C]ounsel may not assume or state facts not in evidence [citation] or mischaracterize the evidence [citation]." (*People v. Valdez* (2004) 32 Cal.4th 73, 133.) In this case, however, the unsupported argument was harmless under any standard of review. (Compare *People v. Hill* (1998) 17 Cal.4th 800 [involving multiple, egregious acts of prosecutorial misconduct].)

CALCRIM No. 362

Appellant claims that the court erred in instructing the jury with CALCRIM No. 362 on consciousness of guilt because there was no evidence to support the instruction. The record belies this claim.

The court instructed the jury as follows with CALCRIM No. 362: "If defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

The prosecutor made the following reference to the instruction in her argument: "The defendant was asked by Detective Kies, specifically, for times and names, and Detective Kies said, 'Who were you with? Give me as much detail as possible.' His chronology in that interview is riddled with inconsistencies. . . .

[¶] You will have another jury instruction that says that if the defendant makes a false or misleading statement relating to the charged crime knowing that it was false and misleading you may consider that as a consciousness of his guilt."

The court has a sua sponte duty to instruct on consciousness of guilt when there is evidence that the defendant intentionally made a false statement from which such an inference could be drawn. (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1103-1104.) The false nature of the defendant's statement may be shown by inconsistencies in the defendant's own testimony, his or her pretrial statements, or by any other prosecution evidence. (*People v. Kimble* (1988) 44 Cal.3d 480, 498.) Here, appellant's inconsistent statements, as well as the physical evidence and testimony of other witnesses, would support the interference that appellant knowingly made a false statement.

Griffin

We reject appellant's contention that his conviction must be reversed because part of the prosecutor's closing argument violated his right against self-incrimination. (U.S. Const., 5th Amend.; *Griffin*, *supra*, 380 U.S. 609.) It is error for a prosecutor to comment directly or indirectly upon a defendant's failure to testify in his own defense. (*Id.* at p. 615; *People v. Medina* (1995) 11 Cal.4th 694, 755.) The *Griffin* rule does not preclude comments on the state of the evidence, or on the defendant's failure to introduce material evidence or call logical witnesses. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339; *People v. Medina*, *supra*, at p. 755.) Such comment is improper only if the defendant alone could have given such evidence. (*People v. Bennett*, *supra*, 45 Cal.4th at p. 596.)

Appellant asserts that the prosecutor committed *Griffin* error in arguing as follows: "It is ironic that for as much effort as [appellant's counsel] made to impeach [Tricia] on her lack of memory or inability to recall, it was the defendant in his interview who claimed to not have a memory of the critical events of that night because he claimed that he was drugged. He has no alibi for this time frame that you see on this time line here. He created one by saying that he was drugged

and he didn't remember the events before he went to Krystal Giang's house. He has now had ten months to think about it."

Appellant's counsel objected to that argument and made a motion for a mistrial during the next recess. Counsel explained that he had not objected when the prosecutor initially referred to appellant's lack of an alibi because that comment could have related to appellant's February 17 statement to Kies. When the prosecutor added that appellant then had "ten months to think about it," counsel recognized that it was a direct comment on appellant's failure to testify, in violation of *Griffin*.

After stating that the prosecutor's statement could be interpreted by the jurors "as a failure of the defendant . . . to explain himself after ten months," the court decided to give a curative instruction and denied the mistrial motion. During trial, it instructed the jury that to the extent the prosecutor's comment about appellant having had "ten months to think about it" was a reference to his right to remain silent, it was improper, because a defendant has an absolute right to remain silent and it read CALCRIM No. 355 (Defendant's Right Not to Testify) to them. Appellant later renewed his motion for mistrial based on *Griffin*. The court correctly concluded that the error was cured by its admonition to the jury and denied the motion.

Appellant cites inapposite cases, including *People v. Guzman* (2000) 80 Cal.App.4th 1284, in claiming that the prosecutor committed reversible *Griffin* error. In *Guzman*, the prosecutor "repeatedly and flagrantly denigrated" the defendant's right to remain silent. (*Id*. at p. 1290.) Here, the challenged argument was at most a brief, indirect and mild reference to appellant's failure to testify (*People v. Hovey* (1988) 44 Cal.3d 543, 572) and was cured by the court's prompt admonition to the jury.

New Trial Motion

We reject appellant's claim that the trial court erred by denying his motion for a new trial. We review "a trial court's ruling on a motion for new

trial . . . under a deferential abuse of discretion standard. [Citation.]" (*People v. Hoyos* (2007) 41 Cal.4th 872, 917, fn. 27.) "The appellant has the burden to demonstrate that the trial court's decision was 'irrational or arbitrary,' or that it was not "'grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue." . . . [Citation.]'" (*People v. Andrade* (2000) 79 Cal.App.4th 651, 659.) We find no abuse here.

Appellant argued below and now argues that a new trial was necessary because a combination of factors, including prosecutorial misconduct, discovery violations, *Brady* error, and erroneous rulings deprived him of a fair trial, and prevented the jury from hearing a defense expert testify regarding critical bite mark evidence. The court conducted evidentiary hearings before ruling on the new trial motion.

At trial, Sperber had testified that Benjamin R. could not have made the bite marks on Tricia's face and that he could not exclude appellant as the biter. Like Sperber, the odontologists who testified at the new trial hearing considered the photographs of the bite mark injuries and the dental impressions of appellant and Benjamin R.

Defense witness Bowers, a forensic odontologist, concluded that the assailant's lower teeth caused the marks that are closer to the corner of Tricia's mouth in the photographs. Sperber had reached the opposite conclusion regarding their orientation. Bowers also concluded that appellant could not have made the bite marks but that he could not exclude Benjamin R. as the biter.

Defense witness Duane Spencer, a forensic odontologist, disagreed with Bowers's opinion concerning the orientation of the bite marks caused by the upper and lower teeth in the photograph of Tricia's facial injury. He further concluded that neither Benjamin R. nor appellant could be ruled out as the biter because the injury lacked "the quality to say a certain person did it to any degree of certainty."

Prosecution witness Gregory Stephan Golden, a forensic odontologist, disagreed with Bowers with respect to the orientation of the upper and lower teeth bite marks in the photograph of Tricia's face. Like Sperber, Golden concluded that Benjamin R. could not have made the bite marks on Tricia's face and that he could not exclude appellant as the biter.

After hearing the evidence, the trial court stated that it did not find Bowers's testimony regarding Benjamin R. to be credible after a "comparison of all of the photographs and all the exhibits." It found Johansen, Sperber, Spencer, and Golden to be "more credible expert witnesses." The court also indicated that it did not "take an expert" to realize that the upper teeth caused the bite mark closest to Tricia's mouth.

Further, the court questioned "the significance of the bite mark evidence in light of all the other evidence that was presented in the case." It found that the discovery of Tricia's DNA on appellant's genitals was "the most important and significant evidence" in the case and that the defense had provided no explanation for that evidence. The prosecution considered the bite mark evidence to be very significant. In offering Sperber's testimony that Benjamin R. could be excluded as the biter, the prosecutor stated that it was an "absolute essential issue given the allegations the defense has raised suggesting that Mr. [Benjamin R.] is the assailant . . .[and] we intend to rule him out by the dental evidence." Similarly, in opposing a new trial, the prosecutor stated that "bite mark evidence was one of the most significant pieces of forensic evidence presented to the jury."

The DNA evidence strongly indicates that appellant and Tricia had intercourse, but it does not establish the element of force. While there was other physical evidence to establish that element, including Tricia's multiple injuries, there is no evidence eliminating any particular person as the source of those other multiple injuries. The bite mark evidence is also significant because Tricia initially attributed her facial injury to a hit or a slap from her assailant when Rivlin

interviewed her within hours of the assault. At that time, she told Rivlin that she did not think that she lost consciousness but she was not sure. At trial, she testified that appellant was close to her face during the assault and her cheek hurt as if someone was sinking their teeth into her skin. She also testified that she awoke, alone, with just her shirt and jacket on, and noticed a bite mark on her left buttock but did not know how it got there. An expert witness opined that her blood alcohol level around the stated time of the assault would have been at least .26.

"[T]he trial court may consider the credibility as well as materiality of the evidence in its determination [of] whether introduction of the evidence in a new trial would render a different result reasonably probable. [Citation.]" (*People v. Beyea* (1974) 38 Cal.App.3d 176, 202.) The court below acted within its discretion in finding that Bowers's testimony lacked credibility, and that it would not have changed the result on retrial.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Brian E. Hill, Judge

Superior Court County of Santa Barbara

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